SHOW ME THE MONEY! OR NOT?

MAKING SENSE OF THE 4TH FACTOR OF FAIR USE
A review of fair use

Four fair use cases

Discussion

Questions

We are excited to share information about the law with you, but cannot provide legal advice!
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Fair Use Review

17 U.S.C. 107
FAIR USE

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.
American Geophysical Union v. Texaco
60 F.3d 913 (2d Cir. 1994)

Yuan Li
Texaco is a for-profit corporation. Texaco employs between 400-500 researchers nationwide, conducting scientific research and seeking to develop new products and technology primarily to improve its commercial performance in the petroleum industry. Texaco subscribes to many scientific and technical journals and maintains a sizable library with these materials. Texaco also purchased a CCC photocopy license.
CASE BACKGROUND-CONT.

- American Geophysical Union (Plaintiff) and other publishers (Plaintiff) of scientific and technical journals brought a class action claiming that Texaco (Defendant) infringed their copyright with unauthorized photocopying of articles from their journals.

- Texaco, Inc. (Defendant) claimed it did not infringe a copyright by unauthorized photocopying of scholarly articles as it was a fair use.
In 1992, the U.S. District Court for the Southern District of New York concluded that Texaco’s use was not fair use.

In 1994, United States Court of Appeals, Second Circuit, affirmed the district court’s conclusion.
SECOND CIRCUIT COURT FAIR USE ANALYSIS

- The purpose and character of the use (in favor of publishers)
- The nature of the copyrighted work (in favor of Texaco)
- The amount and substantiality of portion used (in favor of publishers)
- The effect on the market for the copyrighted work (in favor of publishers)
“The court's rejection of Texaco's claim of fair use relied, in part, on its consideration of the fourth statutory fair use factor—the effect of Texaco's copying on the potential market for the copyrighted work—and ultimately on the existence of the CCC. Because Texaco could have paid for its copies under a CCC photocopy license, the court reasoned that the journal publishers had demonstrated the existence of both a "workable" market in photocopy licenses and a substantial harm to the value of their copyrights based on lost licensing revenue attributable to unauthorized copying.”
DISCUSSION ON UNSETTLED ISSUES

- What is considered as transformative use and commercial use?
- What is the extent of permissible copying?
- When does a Personal use exemption apply?
“The Supreme Court has held that the ultimate goal of copyright law is not to promote new markets or economic growth, but rather to advance learning and thereby further the public good. As a mechanism to achieve this goal, the copyright law provides financial incentives to encourage authors and artists to create and disseminate their original works. In applying the copyright law, then, courts must be careful not to favor the mechanism at the expense of the goal.” - Nicole B. Cásarez
“Fair use is intended to balance copyright owners' right to reasonable compensation with the public need for wide dissemination of information." A pure market approach to fair use balances the public interest right out of the fair use equation by creating a user's tax on access to information… Courts can help achieve a proper balance between the rights of copyright owners and those of information consumers by truly considering non-economic factors in applying the fair use doctrine. “ - Nicole B. Cásarez
RESOURCES


Bill Graham Archives v. Dorling Kindersley
448 F.3d 605 (2d Cir. 2006)

© Tomas A. Lipinski, 2019
Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006).

“[S]even artistic images [] depicted on Grateful Dead event posters and tickets” of group Grateful Dead reproduced, reduced in size and distributed with other images of artifacts, photographs, etc. producing a “cultural history” entitled *Grateful Dead: The Illustrated Trip*. Id. at 607.

- “480–page coffee table book … timeline running continuously through the book, chronologically combining over 2000 images representing dates… with explanatory text.” Id.

The backstory: Unsuccessful prepublication negotiations and post publication demands.
**First Factor:** Different, transformative purpose.
- Original purpose: “dual purposes of *artistic expression* and *promotion*.”
- DK’s purpose: “*historical artifacts* to document and represent the actual occurrence of Grateful Dead concert events [] on [] timeline.” Id. at 609.

**Second Factor:** “*images are creative* … core concern of copyright protection, the second factor has *limited weight*.” Id at 612-61.

**Third Factor:** Use of posters “tailored to further its transformative purpose … reproductions of [] images *in their entirety* displayed the *minimal image size and quality necessary*…” Id. 613.
“[P]arties agree” there is no impact on primary market (“sale of the poster images”). Id. at 614.

Question: is there an impact of “the potential to develop a derivative market”? Id.

Loss of potential licensing revenue automatically ≠ negative impact to the Fourth Factor. Otherwise “the fourth fair use factor would always favor the copyright holder.” Id., quoting Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 930, n. 17.
No “harm to BGA’s license market merely because DK did not pay a fee for BGA’s copyrighted images.” Id. at 614.

Again citing Texaco, 60 F.3d at 930, focus instead on the “impact on potential licensing revenues for ‘traditional, reasonable, or likely to be developed markets.’” Id.

- DK did pay license fees to copyright owners of other images used in Illustrated Trip.
- BGA did license its images to others.
- Paying a license fee for a work does not preclude making a fair use of that work. Id. at 615.
“Neither of these arguments shows impairment to a traditional, as opposed to a transformative market.” Id. at 614.

The “copyright holder cannot prevent others from entering fair use markets merely ‘by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work.’” Id. at 615, quoting Castle Rock Entertainment, Inc. v. Carol Publishing Group, 150 F.3d 132, 146, n. 11 (2d Cir.1998).

Transformative use = Transformative Fair Use Market.
Fourth Factor: “Since DK’s use of BGA’s images falls within a transformative market, BGA does not suffer market harm due to the loss of license fees.” Id. at 615.

- This is not a market (Fair Use Market) the owner would expect (“Traditional Market”) to enter.

- The incentive to create is not impacted by use of the work in these markets, e.g., parody, criticism, or review.

Transformative and other Fair Use markets are outside the control of the copyright holder!

© Kathleen DeLaurenti
Pound Cake/Paris Morton Music 2 by Drake

Nothing was the same cover art from pitchfork.com

Jimmy Smith Off the Top cover from Genius.com
Use of the Jimmy Smith recording was ruled a fair use before going to trial by Judge William H. Pauley III in the Southern District of New York!
Original spoke word text:

"Jazz is the only real music that's gonna last," states the lyrics. "All that other bullshit is here today and gone tomorrow. But jazz was, is and always will be."

Line in Drake’s track:

"Only real music's gonna last," states the sampled portion in Drake's track. "All that other bullshit is here today and gone tomorrow."

Drake also re-arranged some of the spoken word text, presenting it in a different order than it appears on the original “Off the Top” record.
FACTS:

- The sample was included without any manipulation of the original recording other than stretching the final word tomorrow.
- Some of the excerpts were re-arranged and presented in a different order.
- Cash Money Records (Drake’s label) obtained a license for the recording, but not the underlying composition!
- The copyright for the underlying composition was not registered until October 23, 2013 (one month after the Drake album was released)
“Was the use of copyrighted material for a different purpose, rather than just reuse for the original purpose?

Was the amount of material taken appropriate to the purpose of the use?

Was it reasonable within the field or discipline it was made in?”

“Ultimately, fair use analysis asks a simple question: Is this the type of use that furthers the essential goal of copyright law and should be excused from liability for infringement?”

Fourth Factor Analysis is tied to the first factor:

“The fourth factor is also, however, closely linked to the first, in the sense that “the more the copying is done to achieve a purpose that differs from the purpose of the original, the less likely it is that the copy will serve as a satisfactory substitute for the original.” Authors Guild, 804 F.3d at 223; Castle Rock, 150 F.3d at 145”
First Factor: Judge Pauley turns to Authors Guild and Campbell v. Acuff-Rose

“[t]he more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright’s goal of enriching public knowledge and the less likely it is that the appropriation will serve as a substitute for the original or its plausible derivatives.” Authors Guild, 804 F.3d at 214.

“merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” Campbell, 510 U.S. at 579.
“Defendants’ use of JSR, by contrast, transforms Jimmy Smith’s brazen dismissal of all non-jazz music into a statement that “real music,” with no qualifiers, is “the only thing that’s gonna last.” Thus, Defendants’ “purposes in using [the original work] are sharply different from [the original artist’s] goals in creating it.” Blanch v. Koons, 467 F.3d 244, 252 (2d Cir. 2006). This is precisely the type of use that “adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message.” Campbell, 510 U.S. at 579.”
FOURTH FACTOR!

“[Does] the copy bring to the marketplace a competing substitute for the original, or its derivative, so as to deprive the rights holder of significant revenues because of the likelihood that potential purchasers may opt to acquire the copy in preference to the original.”

citing Authors Guild, 804 F.3d at 223; Cariou, 714 F.3d at 708–09
“Further, Plaintiffs never attempted to establish a market for licensed derivative uses of the JSR composition copyright until Defendants used the recording on the Album. See Campbell, 510 U.S. at 592 (“The market for potential derivative uses includes only those that the creators of original works would in general develop or license others to develop.”).”
“These considerations, coupled with the finding that Defendants’ use is highly transformative, forestalls the conclusion that Defendants took such “sufficiently significant portions of the original as to make available a significantly competing substitute.” Authors Guild, 804 F.3d at 223. Thus, the fourth factor favors the Defendants.”
TO READ THE DECISION:

Harper & Row v. Nation
471 U.S. 539 (1985)
Laura Quilter
MARKET EFFECT “MOST IMPORTANT” FACTOR?

*The Nation* ran an article scooping *Time*’s serialization of Ford’s memoir, *A Time to Heal*; *Time* canceled its contract with Harper & Row; and (of course) Harper & Row sued *The Nation*. Lower court found infringement; 2nd Circuit reversed & found fair use.

**Key facts**

- Short excerpt (300-400 words of a full-length autobiography)
- *The Nation*’s short article embedded the quotes in a news article with commentary
MARKET EFFECT “MOST IMPORTANT” FACTOR?

Supreme Court granted cert and reversed:
NO FAIR USE.

6-3; O’Connor maj. op.; Brennan dissent

Why wasn’t this fair use?

- Important news (did Ford bargain pardon for presidency?) embedded in analysis / commentary
- Short excerpt (300-400 words of a full-length autobiography)
- Non-fictional & the specific words are important
MARKET EFFECT “MOST IMPORTANT” FACTOR?

Hot takes at the time:
- Heart of the work! (cited in some cases, important in “Under Pressure” case); Ford snark
- 4th factor most important! (used by many cases)
- Unpublished works can’t be fair use! (used by subsequent courts in Salinger v. Random House)

Long take:
- Scooping doesn’t really create new works, and it harms original creator(s)
- HOW (purpose & character) you use authors’ unpublished works is really important!
MORE READING / LISTENING:

Cambridge University Press v. Becker / Patton (various)

Laura Quilter
GSU case: Copyright Clearance Center (licensing company) & publishers association recruited academic publisher plaintiffs Cambridge University Press, Oxford University Press, and Sage, to sue Georgia State University in 2008 for their electronic reserves.

Important holdings early on: GSU is a state entity, and so cannot be sued for $$ damages, but only injunctive relief

Key opinions:
- 11th Cir., Oct. 17, 2014 (Cambridge Univ. Press v. Patton)
- 1st remand to N.D. Ga., April 14, 2016 (amendment of March 31), remedies July 29, 2016
- 2nd 11th Cir. Oct. 19, 2018
FAIR USE AND CLASSROOM USE : GSU

- Personal advice (not legal advice): Do not read. The District Court opinions are long, and the 11th Circuit opinions are not very helpful. Okay, you probably have to read some of it, but do it at the beach.

- Key holdings by District Court, affirmed by 11th Circuit:
  - Nonprofit educational use is a plus on 1st factor
  - Lack of available license for relevant electronic excerpts is a plus on 4th
  - The “classroom guidelines” and the coursepack cases do not control
  - E-reserves (& course management uses) are not per se copyright infringement. Sorry, CCC.

- Also (11th Cir):
  - Analysis must be "holistic" & “qualitative” not “mechanical” & “quantitative”
  - Price of original is not a factor (hmmm)
Laura Burtle, GSU librarian, LibGuide to the case: https://libguides.law.gsu.edu/gsucopyrightcase

Includes invaluable timeline (this case is now 11 years running), plus links to opinions, commentary and analysis.
Putting it all Together
Final thoughts…..
AND WITH THANKS TO...

- The ACRL staff
- Billie Peterson-Lugo, Associate Professor and Director of Digital Library Services and Systems, Baylor University Libraries (our session recorder)
- Carrie Russell, Director of Public Policy and Advocacy, the American Library Association
- The members of ALA’s Copyright, Legislation, Education, and Advocacy Network
HOW DID WE DO?

- Please complete a session evaluation: https://www.surveymonkey.com/r/ACRLeval
- QR Code is available on the bookmarks that were distributed
BE SURE TO ATTEND

Fear the Law No Longer: Fun, Fabulous, and Flexible Fair Use!

Monday, June 24
4:00 PM - 5:00 PM

Location: Washington Convention Center, 143A